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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 515.

BEMIS BROS. BAG COMPANY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari.

BRIEF ON BEHALF OF PETITIONER.

OPINION BELOW AND JURISDICTION.

The opinion of the United States Circuit Court of Appeals, Eight Circuit, is reported under the title "*Bemis Bros. Bag Company* v. *United States*," 60 Fed. (2d) 944–950 (Sup. Ct. Rec. 85–97).

This Court, pursuant to petition duly filed herein, and under the jurisdiction granted it by Section 240-A of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, C. 229, §1; Title 28, U. S. C. A., Sec. 347 [a]), has issued its writ of certiorari to the said Court of Appeals, and this case is now to be considered and determined by this Court under its said writ.

STATUTES AND REGULATIONS INVOLVED.

The applicable provisions of the statute and regulations involved, not copied in the argument, are set forth in Appendix (p. 24).

STATEMENT OF FACTS.

This suit was begun in the District Court of the United States for the Eastern District of Missouri *on January 2nd, 1929* (R. 1). Plaintiff (petitioner) seeks the recovery of income and profits taxes overpaid for 1918 and 1919. The petition alleged as one of the bases therefor the right to the additional invested capital hereinafter described.

At the trial of the case all of the facts were stipulated, and it was further stipulated as follows (R. 14):

> "If the plaintiff, within the time provided by law, filed claims for refund for the years 1918 and 1919, respectively, which, under the law, were sufficient to be the required preliminary for the maintenance of this action on that ground, above stated, then plaintiff will be entitled to judgment for the year 1918 in the amount of $14,054.18, with interest, and for the year 1919 in the amount of $9,073.15, with interest."

Copies of the original tax returns, claims for refund, the supplements or amendments to the claims, the Commissioner's letter to the Revenue Agent, the report of the Revenue Agent, and the Commissioner's letters to the taxpayer and the taxpayer's replies thereto are attached to the stipulation as exhibits to be considered as evidence in the case (R. 25 et. seq.).

The following facts appear from the stipulation and exhibits attached:

Petitioner filed its returns of income and invested capital for the years 1918 and 1919 in due time and paid the profits taxes and income taxes shown by such returns, respectively, at the quarterly due dates in 1919 and 1920. It paid an additional assessment of $98,549.28 for the year 1918 on June 30, 1920, and the balance thereof, $695.70, was paid in 1922 by a credit. It paid on December 16, 1920, an additional assessment for 1919, amounting to $34,630.31 (R. 10–11).

Petitioner overpaid its said taxes for the year 1918 in the amount of $14,054.18 and for the year 1919 in the amount of $9,073.15. The Commissioner of Internal Revenue refused to refund these overpayments because he alleged the claims for

refund filed within due time were not sufficient (R. 14, 73, 77).

On February 29, 1924, petitioner duly filed its claim for refund of taxes overpaid for 1918 (R. 11) and on December 12, 1924, it filed a similar claim for refund for 1919 (R. 11–12). *Both claims were timely.*

The claims for refund filed for both years were identical so far as the matter in controversy here is concerned (R. 25). They prayed that the excess profits and war profits taxes for 1918 and the excess profits tax for 1919 be determined in the manner provided in Section 328 of the Revenue Act of 1918 (approved February 24, 1919, 40 Stat. 1093, C. 18). (Appendix, p. 25.) A printed statement of facts which had been prepared in support of a claim for assessment of the 1917 taxes under Section 210 of the Revenue Act of 1917 (approved October 3, 1917, 40 Stat. 307, C. 63) was attached to and made a part of the claims for 1918 and 1919 (R. 30–51).

In this statement the right to special assessment rested upon three bases (R. 31): (1) The Commissioner is unable to determine the invested capital; (2) A mixed aggregate of tangible and intangible property has been paid in for stock, and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at time of payment; and (3) The tax if determined without the benefit of Section 210 (Section 328 of the 1918 Act), owing to abnormal conditions affecting the capital and income, would work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without the benefit of Section 210 (Section 328 of the 1918 Act) and the tax computed by such reference.

The claims asserted specifically the following facts, among others, as a reason why the Commissioner was unable to determine the invested capital:

(a) That the petitioner possessed certain brand printing plates and patterns made of metal, the cost of which was not included in petitioner's invested capital, as theretofore calculated by the Commissioner. All of the facts concerning the acquisition of said equipment, the weight of metal therein,

the cost of the metal, the manufacture of plates, patterns, matrices, and so forth, and the cost thereof, were set out in the claim for refund (R. 35).

(b) That petitioner at its organization had issued its capital stock specifically for good will and tangible property as a mixed aggregate, and that in order to determine the amount of the invested capital to be allowed for the good will, it was necessary to allocate that stock between the two classes of assets, which the Commissioner was unable to do. All of the facts concerning the value of the tangible properties and good will, how and when acquired, the capital stock issued therefor, and other pertinent facts were set out in the claims for refund, and it was stated that the Commissioner in his previous audit had not allowed any invested capital therefor (R. 37–41).

The original claims further stated that if the values or cost of the respective classes of property could be satisfactorily determined, petitioner would be entitled to additional invested capital, and cited the rulings and regulations pertaining thereto (R. 39).

On October 30, 1926, the Commissioner of Internal Revenue advised petitioner by letter that "the claim for 1919 will be rejected in full," and that the Collector "will be officially notified of the rejection at the expiration of thirty days from the date of this letter." In said letter, the Commissioner stated (R. 55):

> "You are advised that after careful consideration and review your application under the provisions of Section 327 of the Revenue Act of 1918 has been denied for the reason that the evidence presented fails to establish that your invested capital or net income is affected by abnormal conditions which would justify the Bureau in computing your tax under the provisions of Section 328 of the above-mentioned Act."

On November 27, 1926, the Commissioner by letter advised the petitioner that the claims for refund of taxes for both the years 1917 and 1919 would be rejected in full and that the Collector of Internal Revenue would be officially notified of the rejection (R. 56).

On December 13, 1926, petitioner sent a verified letter to the Commissioner protesting against the rejection of said claims for refund and, as one of the reasons, stated (R. 57–58):

> "(b) If the assessment of the excess profits taxes against the Company in the matter claimed in the above subdivision is denied, then the items heretofore presented which have been improperly eliminated from invested capital should be restored to invested capital and the excess profits tax recalculated on that basis."

In the said protest, petitioner listed the additions claimed to the surplus account, which is a summary of the items listed in the original claim, and stated that these items should be added to invested capital and the tax recomputed on that basis. *The list includes the printing equipment and the good will described above* (R. 58–59).

Hereafter we refer to the letter of December 13, 1926, as the amendment to the claim. The facts set forth in that letter were further elaborated in a verified letter of petitioner addressed to the Commissioner on April 12, 1927 (R. 61–68).

After he received said amendment the Commissioner of Internal Revenue reconsidered his previous ruling, proposing to reject said claims, held a conference with petitioner's representatives and caused its books to be investigated by a Revenue Agent in St. Louis upon the matters involved in said claims, recalculated the taxes and found the overpayments stated above (R. 12, 13). Under date of December 17, 1927, he sent a letter to petitioner (R. 68), *in which he found the petitioner was entitled to additional invested capital on account of the two assets above stated. He further found that petitioner had overpaid its taxes in the amount above stated, but refused to refund the overpayment for the reason stated as follows* (R. 73, 77):

> "Inasmuch as computation of your tax liability for 1918 and 1919 under the provisions of Sections 327 and 328 of the Revenue Act of 1918 is denied and your claim for the refunding of $1,270,907.97 for 1918 is confined to

> that point, *it will be rejected in full in the next schedule to be approved by the Commissioner.* (Italics supplied.)
>
> "Your claim for the computation of your tax liability for 1919 under the provisions of sections 327 and 328 has already been rejected."

The Commissioner of Internal Revenue gave no consideration or effect to said amendment.

Petitioner replied in detail to the Commissioner's letter under date of December 22, 1927 (R. 77–83), and took exception to the statement therein that the claim for refund for 1919 under the provisions of Sections 327 and 328 had already been rejected, stating (R. 78):

> "* * * *In this connection your attention is called to the fact that this ruling was immediately suspended and the taxpayer was granted further consideration of his claim.*" (Italics supplied.)

The judgment of the United States Circuit Court of Appeals rests upon two conclusions set forth in the Court's opinion, which are as follows:

(a) The Court ruled that the claims for refund were rejected by the Commissioner of Internal Revenue by his letters dated October 30, 1926, and November 27, 1926, and that the amendment filed December 13, 1926, could not be considered because it was offered after the claims were rejected (R. 93).

(b) The Court ruled that, although the original claims for refund set forth all of the facts which are alleged in the petition filed in the District Court and which are the basis of the action, the claims were not sufficient to sustain the suit because these facts were set forth in the claims in support of a prayer for assessment under said Section 328 of the Revenue Act of 1918, whereas the overpayment was found under Section 301 of said act (R. 95–96).

SUMMARY OF THE ARGUMENT.

1. The Court of Appeals without reason found the facts contrary to the stipulation of the facts and the record. The

Court of Appeals held that the claims for refund were rejected before December 13, 1926, when the amendment to the claims for refund was offered, and therefore the amendment came too late. This holding is based solely upon the statement in two letters (one for each year) written by the Commissioner of Internal Revenue in October and November, 1926, in which the Commissioner stated that the claims would be rejected on the next schedule. The parties by their stipulation, stating what conduct followed these letters, disclosed that the rejection was not actually made and the letter written by the Commissioner on December 17, 1927, stated, as to the claim for 1918, that it would then be rejected. Having stipulated all of the facts, following the letters, which the Court held constituted a rejection, the parties further stipulated that the plaintiff (petitioner) was entitled to recover judgment for the amount sued for, if its claim for refund was sufficient to be the foundation for the suit and thereby agreed that the date of the rejection of the claims for refund was immaterial to the case. This rejection became decisive of the case under the Court's ruling. The Court of Appeals decided the case upon an issue never made in the court below or at any time in the record.

2. The original claims for refund were sufficient without amendment, because they set up all the facts and described the additional invested capital upon which the suit in the District Court was based. The prayer in the claim that the taxes, by reason of these facts, be recalculated under section 328 was mere surplusage, as the Commissioner was compelled to so calculate the taxes if he was unable to determine the invested capital to be allowed for the assets described in the claim, such assets having not theretofore been entered in invested capital. If he was able to determine the invested capital to be allowed for such assets, then he was required to make any refund resulting therefrom, the facts only being required to be stated by the regulations. The prayer for special assessment could not and did not destroy the claim as one for the additional invested capital, set out in the claim. The original claims, without amendment, were sufficient as the

required preliminary for this suit, and under the stipulation of the parties judgment should have been given for the petitioner, even though the amendment were not considered.

3. The amendment merely demanded invested capital because of the cost of two assets, which in the original claims were set out as assets, the cost of which was not previously entered into the calculation of invested capital. The amendment merely demanded relief to which the facts set up in the original claim entitle petitioner. The amendment in no manner set up a new cause of action or a new ground of refund. It related back to and became a part of the original claims.

ARGUMENT.

1. The Court of Appeals, without reason, found the facts contrary to the stipulation of facts and the record.

Section 3226, Revised Statutes, as amended by the Revenue Act of 1926 (44 Stat. 116, C. 27; Title 26, U. S. C. A., Sec. 156), reads as follows:

> "Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which

such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

The parties stipulated the dates when the taxes were paid and when the claims for refund were filed, showing that such claims were timely. *The parties further stipulated that petitioner (plaintiff) is entitled to judgment "if the claims for refund filed by the plaintiff were sufficient to be the required preliminary for the maintenance of the suit."*

Notwithstanding this stipulation, the Court of Appeals held that the claims for refund were denied or rejected by the Commissioner of Internal Revenue, respectively, on October 30, 1926, and November 27, 1926, because the Commissioner on these dates wrote that the claims would be rejected on the next schedule. The Court so held notwithstanding, also, that the stipulation stated that thereafter plaintiff (petitioner) filed the amendment, described, to its original claims, that the Commissioner arranged and held a conference with the taxpayer's representatives, called for a conference thereon, requested a further statement from the taxpayer which was furnished, asked the Revenue Agent to investigate the facts, reviewed the Revenue Agent's report and wrote petitioner more than a year later in letter dated December 17, 1927, that the *claim for 1918 would thereafter be rejected* (R. 68–77). This letter also stated that the claim for 1919 had already been rejected, but petitioner replied thereto (R. 77–83) and without denial stated that the previous ruling as to 1919 had been suspended (R. 78).

The parties by the stipulation that plaintiff was entitled to recover, if the claims for refund were sufficient, avoided the necessity of setting out exactly when the claims were actually rejected. Nevertheless the Court of Appeals held that these letters constituted rejection, contrary to the stipulation of the parties and the facts inconsistent therewith above mentioned. This issue had never, theretofore, been raised.

The Court used the finding in an awkward, inept manner—that is, it held the amendments filed December 13, 1926, were

filed after the claims were rejected, but it is plain there is no basis for the finding for any purpose.

That the holding is contrary to the stipulation of the parties becomes apparent when the facts, as found by the Court of Appeals, are given proper effect. If the claims for refund were rejected at the date when the Court finds they were rejected, to wit, in 1926, then of course this *suit filed on January 2, 1929*, was instituted more than two years after the claims for refund were rejected, and would be barred by the two year clause in Section 3226 R. S. When the parties stipulated that plaintiff was entitled to recover under the conditions mentioned, they agreed, in effect, that the claims were rejected after January 2, 1927, and that the date of the rejection of the claims was immaterial, and that no defense could be maintained upon that basis. *The Court's decision is directly contrary to this stipulation, and can be justified only if a notice of an intention to reject is an irrevocable rejection of the claim.*

In the case of *United States* v. *Memphis Cotton Oil Company*, decided January 9, 1932 —— U. S. ——, 77 L. Ed. 291, this Court said:

> "One other question, less general in its significance, is yet to be considered. An argument is made that at the time of this amendment the claim had been finally rejected and the proceeding thereby ended. If so, it was too late (McKesson & Robbins *v.* Edwards, supra; Solomon *v.* United States, 57 F. [2d] 150). When correction is thus postponed, there is no longer anything to amend any more than a lawsuit after the complaint has been dismissed. *We think the matter is still in fieri.* True, the Deputy Commissioner had given notice to the taxpayer that the claims would be rejected, and that the rejection would be officially announced in a schedule to be approved thereafter. *No reason is apparent why at any time before such approval the Commissioner or his Deputy was not at liberty to recall the first announcement and dispose of the case otherwise* (Michel *v.* United States, 37 F. [2d] 38, reversed, but on other grounds, 282 U. S. 656). We are not now considering what the practice ought to be if there were need to open the proceedings for the submission of other evidence extrinsic to the claims themselves.

> Neither in the record nor in the argument do we find a suggestion of that need. Long before the amendment the Commissioner had ascertained the facts and had even notified the taxpayer of the justice of its claims and of the ruling of the Bureau that adjustments would be made accordingly. *The dismissal of the claims, when finally announced, was for defects of form only. The defects had been corrected and the dismissal may not stand.*" (Italics supplied.)

Upon facts going far beyond the facts in this case, the Court of Appeals in the case of *McKesson & Robbins* v. *Edwards*, 57 F. (2d) 147, cited by this Court with approval, *supra*, ruled that the claims were not rejected.

The Court of Appeals was quite apparently in error in this case.

2. The original claims for refund, without any amendment or supplement thereto, were sufficient as the required preliminary for this suit.

Section 301 of the Revenue Act of 1918 (approved Feb. 24, 1919, 40 Stat. 1088, C. 18) imposed an excess profits tax and war profits tax equal to certain percentages of the income, which percentages increased as the income exceeded named percentages of the invested capital.

Section 326 of the act defined invested capital.

Section 327 reads as follows:

> "Sec. 327. That in the following cases the tax shall be determined as provided in section 328:
>
> "(a) Where the Commissioner is unable to determine the invested capital as provided in section 326.
>
> "(b) In the case of a foreign corporation.
>
> "(c) Where a mixed aggregate of tangible and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds respectively.

"(d) Where, upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit under a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive."

In *United States* v. *Factors & Finance Company*, decided January 9, 1933, —— U. S. ——, 77 L. Ed. 302, the taxpayer filed a general claim for refund of taxes paid for 1917. In an amended claim the taxpayer set out the reasons why special assessment should be made under Section 210 of the Revenue Act of 1917. This Court held the amendment a proper amendment, saying:

"* * * In an application for special relief under Section 210 of the Act of 1917, the grounds of challenge are very different if the letter of the section is the measure of relief thereunder. The value of the invested capital under the statutory definition (Revenue Act of 1917, Section 207) is not put aside in such circumstances as an irrelevant inquiry. On the contrary, it becomes the very essence of the claim by the taxpayer that there must be a recourse to another method. Under Section 210 of the Act of 1917, the special method is not permissible unless 'the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital.' In brief, Section 210 of the Act of 1917 is the precursor of Section 327 (a) of the Act of 1918, and is not at all the analogue of section 327 (d). * * *

"* * * Under Section 210 of the Act of 1917, as under Section 327 (a) of the Act of 1918, the Commissioner acts of his own motion whenever he is unable to satisfy himself that the valuation will be accurate if there is adherence to the statute.

"This question, if no other, he must have considered and determined when a claim for refund was submitted by the taxpayer without specifying the grounds (United States *v.* Memphis Oil Company, —— U. S. ——). This question, if no other, he must again have considered and determined when he certified to the taxpayer, after the claim had been amended and after submission of the evidence, that Section 210 of the Act of 1917 supplied the applicable rule. * * *

"The cumulative force of these administrative opportunities and these procedural analogies upholds the claim and the amendment."

The claims for refund in this case rested first and primarily (another basis was included) upon the statement that the Commissioner is unable to determine invested capital, that is, upon subdivision (a) of Section 327 of the Revenue Act of 1918, which this Court ruled, in *U. S.* v. *Factors & Finance Co. supra*, follows and corresponds to Section 210 of the Revenue Act of 1917.

It is worthy of note that subdivision (c) of Section 327 is also a case where the Commissioner is unable to determine invested capital, because if he is unable to determine the respective values of the several classes of property, he can not determine the amount to be allowed for each.

The claims for refund in this case set out the two assets, described above, which, under section 326 of the act, constituted additional invested capital, and which had not been allowed as such, disclosing (and contending) that the tax was improperly calculated *under the normal method.*

Under these claims, as this Court rules above, it was the duty of the Commissioner, first, to investigate whether he could determine invested capital under Section 326 of the Revenue Act of 1918 and to do so he was compelled to determine the amount of invested capital which should be allowed be-

cause of the two items which he had theretofore omitted from his calculation. If he could not fix the amount of invested capital to be allowed because of these two items, then he was compelled to grant the prayer of the claim and calculate the taxes under Sections 327 and 328. And his only basis for denying this classification was that he could determine the invested capital, the first step that was required before he passed on the special assessment application.

The claims compelled him to audit these two items and find out whether or not he could determine the invested capital to be allowed for them, and if by the claims he was compelled to do so, then it follows, when he found that he could do so, he was compelled to make the refund resulting therefrom.

The original claims, under the ruling of this Court, were sufficient for the maintenance of this action, which rests upon the right to the very same invested capital which the Commissioner, as a result of the audit of the claims for refund, found that he could determine and which he did allow.

This is supported by consideration of the administrative practice and the "end and aim" of a claim. The Treasury Department regulations required only that the facts be stated in the claim for refund. Article 1306 of Regulation 65 (effective when claims filed) reads as follows:

> "Claims by the taxpayer for the refunding of taxes, interest, penalties and additions to the tax erroneously or illegally collected, shall be made on Form 843. All facts relied upon in support of the claim should be set forth clearly under oath."

The facts, alone, are required because it was assumed that the Commissioner knew the law and would give it effect. Paragraph b of Section 250 of the Revenue Act of 1918 (Appendix, page 25) required the Commissioner of Internal Revenue to audit returns and to assess deficiencies and to credit or refund to the taxpayer any overpayment. To audit a return the Commissioner only required the facts.

The departmental practice in the application of special assessment is set out in Regulations 45, Article 901, repeated

in Regulations 62, Article 901 (set out in Appendix, p. 26). As appears from this regulation, no application is necessary to secure assessment under Section 328 where the Commissioner is unable to determine invested capital. The practice is set out in detail in Prentice Hall, Federal Tax Service, Special Volume 1928 and Prior Laws, paragraph 33489, which reads as follows:

> "The Commissioner will compute the tax under Sec. 328 without application by the corporation in the following cases:
>
> "(1) Where the invested capital can not be determined under the provision of Sec. 326.
>
> "(2) For all foreign corporations.
>
> "(3) Where a mixed aggregate of tangibles and intangibles has been paid in for stock or for stock and bonds and the respective values of the several classes of property when paid in or the respective classes paid in for stock and for bonds can not be satisfactorily determined."

So far as this claim rested upon the right to additional invested capital, the prayer that the tax be determined under section 328 *was mere surplusage*. The statute is mandatory as to the manner of assessment in such case (appeal of *Davis & Andrews Co.*, 2 B. T. A. 328). Under subdivision (d) of Section 327 assessment can be granted under Section 328 only upon application of the taxpayer, and in such case the prayer for such assessment is necessary and material. But where subdivision (a) applies the Commissioner must compute the tax under Section 328 upon his own initiative and without any application by the taxpayer. Where, therefore, as in this case, invested capital not included in the Commissioner's previous calculation of invested capital is disclosed to him upon a claim for refund it is unnecessary to make any claim for any particular relief therefor. If the Commissioner can determine the amount of invested capital to be allowed therefor he must of his own initiative allow it as such and recalculate the tax under Section 301 of the act (Sections 250 and 252, Rev. Act of 1918), and if he can not determine such amount he must likewise of his own initiative calculate the tax under

Section 328 of the act. *The prayer for relief under Section 328 in such a case, being without any effect and utterly useless, could not constitute or identify the ground or basis of refund.*

The lower courts uniformly have held that a claim for refund which sets out the facts is a sufficient claim, although it alleges the wrong theory of relief (*Paul Jones & Co.* v. *Lucas*, 33 Fed. [2d] 907; *Warner* v. *Walsh*, 24 Fed. [2d] 449; *Union Trust Co. of Pittsburgh* v. *McCaughn*, 24 Fed. [2d] 459; *Dreyfuss Dry Goods Co.* v. *Lines*, 24 Fed. [2d] 29; *Neuland* v. *Bowers*, 38 Fed. [2d] 842; *Wunderle* v. *McCaughn*, 38 Fed. [2d] 258, 259).

Rules of pleading support this contention and disclose the sense of it. Generally it is held that the facts alleged identify a cause of action, and that the prayer for relief does not.

For instance, in *Parker State Bank* v. *Pennington*, 9 Fed. (2d) 966, the Court said (p. 970):

> "* * * The nature of the cause of action depends upon the facts pleaded in the complaint as a whole, and if it alleges an action upon a contract, the plaintiff is entitled to recover thereon, although the plaintiff alleges a conversion and remedies ex delicto are asked. * * *"

See, also:

49 C. J. (Pleadings), Section 188, p. 173.

Those facts (when set out in the claim) which cause reduction in the tax liability, so that a refund is owing, are the grounds for the claim, just as those facts which show the right of recovery in a petition or declaration are the cause of action therein.

In *U. S.* v. *Memphis Cotton Oil*, *supra*, concluding after reference to the rules of pleading, this Court said:

> "With this background of analogy, we reach the specific problem that calls for answer here. The respondent filed a claim for taxes overpaid, a claim for money had and received to his use by the agents of the government. The identity of the cause of action may be said in one aspect to depend upon the mere fact of overpayment, the existence of a net balance owing to the taxpayer after the

ascertainment of all items of debit and of credit. *In another aspect it may be said to depend upon the identity of the items illegally exacted, and hence upon the particular grounds that determine illegality.* Choice between these meanings must avoid a doctrinaire adherence to abstract definitions. It must keep in view the realities of administrative practice, for its effect will be to regulate the conduct of administrative officers. Definitions and analogies borrowed from pleadings in a lawsuit will have their place and recognition, but in due subordination to differences of end and aid. Viewing the problem thus, we must say whether a statement by the taxpayer of supporting facts and reasons is to be assimilated to a bill of particulars explanatory of a claim, or is something so essential that there can be no claim without it." (Italics supplied.)

Whether the cause of action in a claim is either of the alternatives stated by this Court—that is, whether it is the "mere fact of overpayment" or whether it is "the identity of the items illegally exacted," this claim was sufficient. "Whether the supporting facts and reasons be assimilated to a bill of particulars explanatory of a claim" or whether "there can be no claim without it" this claim was sufficient. When the facts concerning the additional invested capital were set forth in the claims for refund in this case (whether additional invested capital was asked as such, or because of such fact it was asserted the Commissioner had not and was unable to determine the invested capital and the taxpayer had requested assessment under Section 328) those facts constituted the cause of action, the grounds for refund, because those facts were the basis for the claim of overpayment—"the group of operative facts out of which the grievance develops—the items illegally exacted" must identify the cause of action—that is, the recovery sought, *when the claim is addressed to an administrator of the law, whose duty it is to apply whatever provision of the law is applicable to such group of operative facts.*

Also in *United States* v. *Henry Prentiss & Company*, — U. S. —, 77 L. Ed. 297, where the original claim for refund rested upon subdivision (d) of Section 327 of the Revenue Act of 1918

(it alleged only that the tax if determined without the benefit of Section 328, due to abnormal conditions affecting capital or income, would work exceptional hardship upon the taxpayer), this Court, in determining the propriety of the amendment, resorted to the analogies of law, subordinated to departmental procedure and practice. The Court there held that such claim was far apart from a claim of error in the normal method of calculation of the tax, and that an amendment claiming a refund resulting from additional invested capital was improper, because in the words of the Court:

> "The presentation of such a claim, unlike the presentation of a claim of error in fact or law, does not suggest the need for a new and general audit of the assets and liabilities." * * *

The Court also said:

> "* * * A statement, without explanation, to the effect that overpayments have been made in an aggregate amount is broad enough to cover any and all grounds for reassessment and return. *This at all events is true where the basis of the grievance is that the tax has been erroneously computed even by the normal method, that there has been a deviation, in other words, from the statutory rule.* * * *
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> * * * * * * * * *
>
> "* * * *Upon a claim of deviation from the statute, the taxable balance for the year will be subject to reaudit, as if the tax were laid anew.* * * *" (Italics supplied.)

The two claims in the present case asserted that two items of invested capital had been omitted from the invested capital theretofore allowed, showed and claimed that the tax had been erroneously computed by the normal method; that there had "been a deviation from the statutory rule," necessitating a new and general audit of assets and liabilities" and the taxable balance. If these necessities arose upon the original claim, as this Court has held they did, then the original claims, without any amendment, were sufficient to require a refund of the overpayment resulting from the audit and were sufficient as the foundation for this suit.

The Court of Appeals should have directed judgment for petitioner, even though it disregarded the amendments.

3. The amendments or supplements filed on December 13, 1926, were proper amendments to the original claims for refund.

The amendments set out no new facts; they merely changed the prayer for relief.

In *United States* v. *Memphis Cotton Oil Company, supra,* upon the question of the propriety of an amendment, this Court reached the conclusion above quoted as to what constitutes the cause of action in a claim for refund. This Court refers to the analogies suggested by rules of pleading, of which reluctantly we limit quotation to the most pertinent statements:

> "Both the Government and the taxpayer invoke analogies suggested by pleadings in a lawsuit. The general rule is said to be that an amendment of a pleading will take effect by relation and thus relieve against the bar of an intervening limitation if the identity of the cause of action is still substantially the same, but that the limitation will prevail if under the guise of an amendment there is the substitution of a new cause of action in place of another wholly different (citations). The analogy is helpful, yet it will confuse, instead of helping, if we do not insist at the beginning upon a definition of our terms or at least a recognition of their shifting meanings. A 'cause of action' may mean one thing for one purpose and something different for another. * * * At times and in certain contexts it is identified with the infringement of a right or the violation of a duty. At other times and in other contexts it is a concept of the law of remedies, the identity of the cause being then dependent on that of the form of action or the writ. Another aspect reveals it as something separate from writs and remedies, the group of operative facts out of which a grievance has developed. This court has not committed itself to the view that the phrase is susceptible of any single definition that will be independent of the context or of the relation to be governed. None the less, it has fixed the limits of amendment with increasing liberality. * * * In Friederichsen *v.* Renard, 247 U. S.

> 207, a cause of action by a defrauded buyer to set aside a contract was turned into a cause of action to recover damages for deceit. 'Of course an argument can be made on the other side, but where a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of the opinion that a liberal rule should be applied' (*New York Central Railroad Co.* v. *Kinney*, *supra*, p. 346)."

As to the right and propriety of the amendment and the duty of the Commissioner thereafter, this Court concluded in the above case that:

> "In the light thus supplied by the practice of the Bureau, and the analogy of pleadings, the way is cleared for a conclusion. The line of division must be kept a sharp one between the function of a statute requiring the presentation of a claim within a given period of time, and the function of a regulation making provision as to form. The function of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research. The Commissioner has the remedy in his own hands if the claim as presented is so indefinite as to cause embarrassment to him or to others in his Bureau. He may disallow the claim promptly for a departure from the rule. If, however, he holds it without action until the form has been corrected, and still more clearly if he hears it, and hears it on the merits, what is before him is not a double claim, *but a claim single and indivisible, the new indissolubly welded in the structure of the old.*" (Italics supplied).

This Court says the function of the statute is to give protection against stale demands. The function of the regulation is to facilitate research. The original claims did both. The amendment did not add an iota to the grievance set up or to the "right infringed" or the "duty violated." It merely changed the prayer for relief.

A change of the prayer for relief is not a change of the cause

of action if the ground of grievance and the facts are not changed.

49 C. J. (Pleadings), Section 673, p. 510, and Section 695, p. 525; also
37 C. J., Limitation of Actions, Section 517, p. 1079, and Section 507, p. 1068.

In this case the "defendant had notice from the beginning that the plaintiff (petitioner) sets up and is trying to enforce a claim against it for specified conduct" (failure to allow invested capital for the two described assets) and "the reasons for the Statute of Limitations do not exist" (statement in *N. Y. Central* v. *Kinney*, quoted in *Memphis Cotton Oil Co.* case, *supra*).

The Commissioner held the claims and heard them on the merits, and the amendment and the original claims were "but a claim single and indivisible, the new indissolubly welded in the structure of the old."

In the case of *Henry Prentiss & Company*, *supra*, no facts were alleged; only a conclusion of right was asserted. The cause of grievance was identified as exceptional hardship resulting from the normal method of calculation, which, of course, did not call for a reaudit under the normal method. This Court held that the right asserted, being a right to discretionary relief calling for no audit of tax liability under the normal statutory method, could not be assimilated into a claim for relief resulting from such normal method of calculation.

The facts set forth in the original claims for refund in the present case, as is pointed out above, did call for such an audit. In the present case it was not only asserted that the Commissioner had not determined invested capital properly, but the very items constituting his error in the previous determination were called to his attention. These were the occasions of grievance and compelled him to make an audit of the normal method of calculation. By the facts, disclosed to him, it was shown that he had not theretofore properly determined in-

vested capital and he could conclude that he could determine invested capital properly only by doing it, that is, by reauditing the return and determining invested capital to be allowed for those facts.

So the amendment in this case praying that the facts, alleged originally as showing that the Commissioner could not determine invested capital, be given effect as such invested capital, could not be a change of the cause of action. It was the Commissioner's duty to give the facts effect in invested capital whenever they were disclosed to him. The prayer that he do so added nothing to his duty under the original claim; it merely pointed out his duty.

We submit that this Court's decision in *U. S.* v. *Factors & Finance Company, supra*, concludes this case: This Court there held that a general claim for refund for 1917 can be amended (after limitation bars the filing of a new claim) so as to claim assessment under Section 210 of the 1917 Act, upon the basis that the Commissioner can not determine invested capital as defined by the act. The converse must also be true, to wit: a claim (under Section 327 [a] of the 1918 Act corresponding to said Section 210 of the 1917 Act) upon the basis that the Commissioner can not determine invested capital as defined by the act may properly be amended to claim additional invested capital, and certainly so if the original claim set out and described the assets possessed, as additional invested capital, which by the amendment are merely claimed as such.

Moreover, the Commissioner held these claims until the amendment was filed, and he continuously granted hearings and considered them on the merits, and, as this Court points out in *United States* v. *Memphis Cotton Oil Co., supra*, the Commissioner can not thereafter reject them for lack of formality of the original claims.

4. Conclusion.

In the case of *United States* v. *Factors & Finance Co., supra*, the claim was a general claim, which the Court held could by amendment be converted into a claim for special relief under

Section 210 of the Revenue Act of 1917. In the case of *United States* v. *Memphis Cotton Oil Co*, *supra*, the claim was a general claim which the Court held could by amendment be converted into a claim for relief because of specific errors in the normal method of audit. In the case of *United States* v. *Henry Prentiss & Co.*, *supra*, the claim was a claim under Section 327 (d) of the Revenue Act of 1918, alleging only that the normal method of calculating the tax resulted in exceptional hardship against the taxpayer, and the Court held that this could not be converted into a claim of error in the normal method of calculation.

The Court in all of these cases looks for guidance to the rules of pleading, but co-ordinates such rules to the administrative practice and procedure in the audit of returns and claims for refund.

We submit that the minimum effect of these rulings is: (a) If the claim for refund required the Commissioner of Internal Revenue to audit the tax liability, under the normal method of calculation, then recovery of any refund may be had which results from that audit or the disclosure of any facts (brought to his notice before rejection) when such facts are given effect in the normal method of calculation, and (b) an amendment claiming the effect upon the tax, under the normal method of calculation, of facts set out in the original claim, is not a new claim, no departure at all from the original claim and relates back to and becomes part and parcel of the original claim.

The judgment of the Court of Appeals in this case is not sustained by any reason or logic and is contrary to the rulings of this Court referred to above. We respectfully submit that it should be reversed with directions to enter judgment for petitioner for $14,054.18, overpayment for 1918 and $9,073.15, overpayment for 1919, with interest upon said amounts from the dates of their respective payment.

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APPENDIX.

(Act February 24, 1919.)

REVENUE ACT OF 1918.

PART II—IMPOSITION OF TAX.

Sec. 301. (a) That, in lieu of the tax imposed by Title I of the Revenue Act of 1917, but in addition to the other taxe imposed by this act, there shall be levied, collected and pai for the taxable year 1918 upon the net income of every co poration a tax equal to the sum of the following:

First Bracket.

30 per centum of the amount of the net income in excess o the excess-profits credit (determined under section 312) an not in excess of 20 per centum of the invested capital.

Second Bracket.

65 per centum of the amount of the net income in excess o 20 per centum of the invested capital.

Third Bracket.

The sum, if any, by which 80 per centum of the amount o the net income in excess of the war-profits credit (determine under section 311) exceeds the amount of the tax compute under the first and second brackets.

(b) For the taxable year 1919 and each taxable year there after there shall be levied, collected and paid upon the ne income of every corporation (except corporations taxable unde subdivision [c] of this section) a tax equal to the sum of th following:

First Bracket.

20 per centum of the amount of the net income in exces of the excess-profits credit (determined under section 312) an not in excess of 20 per centum of the invested capital.

Second Bracket.

40 per centum of the amount of the net income in excess o 20 per centum of the invested capital.

* * * * * * * * *

PART V—INVESTED CAPITAL.

Sec. 325. * * *
Sec. 326. * * *
Sec. 327. * * *

Sec. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profit per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purpose of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

* * * * * * * * *

PART IV.—ADMINISTRATIVE PROVISIONS.

PAYMENT OF TAXES.

Sec. 250(a) * * *

Sec. 250 (b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.

If the amount already paid is less than that which should

have been paid, the difference shall, to the extent not covered by any credits then due to the taxpayer under section 252, be paid upon notice and demand by the collector. * * *

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Regulations.

Article 901, Regulations 45 and 62:

Art. 901. Treatment of special cases. In the cases specified in Section 327 of the statute the tax will be specially determined under the provisions of section 328, but the tax will not ordinarily be computed under section 328 merely because the corporation's form or manner of organization, or the limitations imposed by section 326, result in a greater tax than would otherwise be payable. A corporation which comes within the provisions of subdivision (d) of section 327 may make application for assessment under the provisions of section 328, which application shall be attached to its return in the form of a statement setting forth in full: (a) The reasons why the tax should be so determined; (b) the facts upon which such reasons are based; (c) an exact description of each trade or business or important branch of a trade or business carried on by it; (d) a statement of the invested capital and net income for each year since the beginning of the prewar period; and (e) a statement showing the amount of gains, profits, commissions or other income derived on a cost-plus basis from Government contracts made after April 5, 1917, and before November 12, 1918, and showing the per cent which such income is of the total income of the corporation. * * *